No. 14073.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

R. H. OSBRINK, M. E. OSBRINK, and BERTON W. BEALS as Trustee, Co-partners, Doing Business Under the Firm Name and Style of R. H. OSBRINK MANUFACTURING COMPANY,

Respondents.

BRIEF OF RESPONDENTS.

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Statement of Case and Issues.

This proceeding is before the court on the petition of the National Labor Relations Board for enforcement of its order against the Respondent.

The proceedings herein are of two types. One is an unfair labor practice proceeding, and the other is a representation case consolidated with the unfair labor practice case for the purpose of considering objections to conduct affecting the results of the election.

The unfair labor practice case was initiated by the filing of a charge which was twice amended, being General Counsel's Exhibits (hereinafter referred to as "G. C. Ex.") 1-A, 1-C and 1-E.

The complaint alleges the discharge of two employees for the reason that they engaged in Union and concerted activities for their mutual aid and protection and to that extent the complaint followed the allegations of the unfair labor practice charges referred to. The complaint further alleged, however, in paragraph 4, seven independent violations of Section 8(a)(1) of the Act, none of which were alleged in the unfair labor practice charges. All of the matters alleged in paragraph 4 of the complaint occurred more than six months prior to the issuance of the complaint.

The objections to conduct affecting the results of election [G. C. Ex. 1-O] set forth a number of incidents as a basis for the objections. At the beginning of the hearing the Trial Examiner brought forth from the General Counsel exactly what he was prosecuting so far as concerns the objections [R. 122-126]. The General Counsel therein specified the limits of his case.

After hearing, the Trial Examiner issued his Intermediate Report in which he found that the Respondent had committed the following unfair labor practices:

1. The discharges of LeFlore and Plummer in violation of Section 8(a)(3) of the Act.

2. The speech of Mr. Osbrink to the employees on January 24, 1952.

3. A statement by one Derry Smith, allegedly a supervisor, that Respondent would close the plant if the Union won the election.

4. Another alleged statement by Smith to employee Goynes that Respondent would withdraw certain privileges if the Union won the election.

5. Another statement of Smith to Goynes that the latter was slated for discharge for Union activities.

6. Another statement allegedly made by Smith to the effect that LeFlore would not be rehired since he had been seen passing out Union pamphlets.

7. Another statement allegedly made by Smith and one Watkins (whom the General Counsel contends is a supervisory employee) to the effect that LeFlore's discharge was for Union activity.

With respect to the representation cases, the Trial Examiner further recommended that the election, which had been lost by the charging Union, be set aside on the grounds that the Respondent's conduct had illegally interfered with the election. His recommendation is based, in part at least, upon a finding that on the day of the election the Respondent withheld pay checks from the employees until after they had voted, and he concluded that this was an illegal interference with the election.

The Trial Examiner, with only a few exceptions, in each case of conflict between testimony of witnesses resolved the conflict in favor of the General Counsel and against Respondent. The exceptions were minor and did

not in any way affect the results of the proceeding. He likewise discredited virtually all testimony of Respondent's witnesses, including testimony on which there was no conflict or contradiction.

The case was then transferred to the full Board and the Respondent filed timely exceptions to the Intermediate Report, together with a motion to dismiss the complaint, and brief. Neither the General Counsel nor the charging party filed any exceptions to the Intermediate Report nor did they file briefs with the Board. The Board thereupon issued its decision which adopts all of the findings and rulings of the Trial Examiner. Thereafter, the Respondent made a motion for reconsideration based in part upon grounds already called to the Board's attention and also based upon a ground not theretofore urged to the Board, the noncomplying status of the charging Union. The Board thereafter issued its supplemental decision denying the motion for reconsideration but nevertheless amending its order and decision and making certain additional findings of fact.

Thereafter, the Board filed its petition for enforcement in this court.

A statement of the facts involved with respect to each of the Board's findings will be given under the titles in which the various points are discussed.

Summary of Argument.

The following is a brief statement of Respondent's position.

1. The charge filed herein and its amendments alleged only violations of the Act by the discharge of certain named employees. The complaint, which was issued more than six months after the events complained of, for the first time alleged violations of the Act by certain other conduct such as coercive statements to employees and promises of benefit if they would refrain from Union activity. We contend that the six month statute of limitations which is incorporated in Section 10(b) of the Act bars any consideration of these alleged violations which were pleaded for the first time in the complaint. This argument is not that the complaint cannot enlarge upon the charge. The argument is that the enlargement here, coming more than six months after the occurrence of the events and not being related to any material contained in the timely charge, is barred by the statute of limitations.

2. The Trial Examiner's findings with respect to certain alleged coercive statements are supportable only because of his finding that certain employees were supervisors within the meaning of the Act. These employees, Derry Smith and Wally Watkins, were in fact not supervisors. They were not identified with management, and the employees would not have considered them as identified with management or as having authority to speak

for management. The evidence can only support a finding that these employees are not supervisory employees.

3. The finding of the Trial Examiner and the Board that LeFlore and Plummer were discharged to discourage Union activity is not supported by substantial evidence on the record considered as a whole. Indeed, the weight of the evidence proves that they were discharged for cause. In ruling on these discharges the Trial Examiner in effect places the burden of proof upon Respondent and discredits sworn testimony of Respondent's witnesses in the absence of conflict of testimony and without giving sufficient weight to the testimony.

4. The proceedings were not conducted in accordance with the requirements of law. The findings of unfair labor practices include matter which the General Counsel did not include in the original statement of his case, and which were not included in the complaint as it can be fairly interpreted. Indeed, the Respondent learned for the first time upon reading the Intermediate Report that certain conduct was alleged to be in violation of the Act. We further contend that the Trial Examiner did not weigh or consider all of the evidence and that he used superficial and hypertechnical standards in considering the testimony of Respondent. We also submit that the Trial Examiner bases his decision, at least in part, on wholly incompetent and irrelevant evidence.

5. The charge herein (and its amendments) was filed by the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, *Region 6*. The Trial Examiner, among his conclusions of law, found [R. 57] that organization to be "a labor organization . . ." within the meaning of the Act. He

further states that the charge was filed by that organization [R. 23]. His findings of fact included a finding that the charging union "is a labor organization within the meaning of the Act" [R. 26]. No exceptions were made by any party to these findings, and the Board adopted them in its decision and order. It is the fact that Region 6 has never complied with Section 9(f), (g) and (h) of the Act. When that fact was called to the Board's attention by the Respondent's motion to dismiss, the Board amended the decision and order to delete the term "Region 6" from the name of the charging organization and wherever it occurred in the decision and order. We contend that the findings of the Board in the absence of timely exceptions as provided by its own Rules and Regulations cannot be altered in this manner and must now be deemed to be conclusive. Since Region 6, if a labor organization, is not in compliance with the Act, the proceeding must be dismissed. We further contend that even if the Board may amend its Decision and Order, it may not do so by the manner in which it proceeded; that is, without notice to the parties and upon evidence not offered at the hearing or properly before the Board.

6. The talk to employees by Mr. Osbrink on the day before the election, fairly interpreted, cannot be considered as coercive or containing promise of benefit if the employees would reject unionization. The sentence relied upon by the Trial Examiner cannot be separated from its context and it must be construed in the light of the entire speech and surrounding circumstances.

7. The withholding of pay checks until after employees had voted is not a violation of law. To hold that such conduct vitiates an election is unrealistic.

ARGUMENT.

I.

The Board's Finding as to Independent Violations of Section 8(a)(1) Are Barred by the Six Month Time Limitations as Provided for in Section 10(b) of the Act.

The original charge initiating this proceeding was filed on January 16, 1952, and was later amended on January 21 and March 4, 1952. The charge and two amended charges claimed certain violations of the Act arising from alleged discriminatory discharges of certain specified employees as prohibited by Section 8(a)(3) of the Act. While violations of Section 8(a)(1) were also alleged as a result of this conduct, such violations would only be within the purview of Section 8(a)(1) in so far as all violations of Section 8(a) are automatically considered to be in breach of Section 8(a)(1). It should be noted that the printed form provided by the Board for the purpose of filing unfair labor practice charges against employers, a copy of which was employed in this case, contains an allegation of violation of Section 8(a)(1) as part of the printed substance of that form. The charging party adds the more specific violations of the Act that are claimed as a result of the employer's conduct. Such a practice is in conformance with a long-established Board ruling that any violation of the provisions of Section 8(a) will, as a matter of course, constitute an interference with the rights of employees as set forth in Section 7 of the Act and, as such, condemned under Section 8(a)(1). Neither the charge nor the amended charges alleged any independent Section 8(a)(1) violations but were confined to the discharges.

The complaint in this proceeding was issued on July 25, 1952, and alleged the discharges as set forth in the initial charge and the amended charges. The complaint further alleged, however, in paragraph 4 thereof, seven independent violations of Section 8(a)(1) of the Act.

In specifying the independent violations of Section 8(a)(1) the complaint is based upon certain alleged statements of supervisory personnel, Mr. Osbrink's speech to the employees, and alleged questioning of employees. All of these acts occurred on or before January 24, 1952, which was a date six months prior to the issuance of the complaint on July 25, 1952. Some of these actions took place as early as October of 1951 [R. 209-210, 227, 240-242, 243-244, 245-246, 251, 263-264, 264-266, 280, 293-294, 317]. There is no question that Mr. Osbrink's speech occurred on January 24, 1952.

It is the contention of the Respondent that under the provisions of Section 10(b) of the Act the independent violations of Section 8(a)(1) as set forth in the Board's complaint are barred by the six-month period of limitations. Section 10(b) provides:

> "(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any

> unfair labor practice occurring more than six months prior to the filing of the charge . . ."
>
> National Labor Relations Act, as amended, Sec. 10(b).

If the intention of Congress as expressed in the foregoing section is to have any meaning or force, the charges of independent violation of Section 8(a)(1) must be held to be barred under the time limits of Section 10(b). What the Petitioner is in fact contending for is a complete nullification of Section 10(b) in so far as it imposes any time limits upon the initiation of unfair labor practice proceedings. If such a contention is adopted, the limitation provision can be completely circumvented by filing broad and indefinite charges under Section 8(a)(1); and then at any period after the lapse of six months amending those charges or issuing a complaint alleging new and different unfair labor practices. Such a practice would clearly be inconsistent with the purposes of Congress in enacting Section 10(b).

An analysis of Section 10(b) indicates that in providing for the issuance of a complaint Congress identified the complaint as "a complaint stating the charges in that respect." The charges in question are identified in a preceding clause: "Whenever it is charged that any person has engaged in or is engaging in any *such* unfair labor practice." It was clearly intended then that the complaint was to be based upon the charges of unfair labor practices as such charges are filed with the Board since the phrase "the charges" as used in referring to the complaint clearly must relate to the initial use of the word "charged" as it appears in the first clause of Section 10(b).

The Respondent recognizes that the Board and the courts have on frequent occasions permitted the Regional Director to issue a complaint which was not restricted to the precise allegations of unfair labor practices as set forth in the charge. However, in permitting such a practice the courts have clearly indicated that it is to be applied only within narrow limitations. In the decision of this court in *N. L. R. B. v. Globe Wireless* (C. A. 9, 1951), 193 F. 2d 748, it was expressly stated that the Board was not prohibited by the amended Act from enlarging upon a charge, but the reservation was expressed that the additional unfair labor practices as alleged in the complaint must not have been committed "more than six months prior to the enlargement." In the decision this court found that the enlarged complaint was valid since the acts upon which the enlargement was based were committed within a period six months prior to the filing of the complaint.

In restricting the enlargement of the complaint to situations where the additional allegations of violations of the Act have occurred within six months preceding the issuance of the complaint this court acknowledged and gave full force to the intention of Congress in enacting Section 10(b). Since the Act requires that charges must be filed within six months of the action complained of, it must follow that where such acts are initially set forth in the complaint and are not based upon, or related to, previous allegations set forth in the charges, they also must meet the time requirements of Section 10(b). In effect, that portion of the complaint which is not set forth in a timely filed charge must be considered the same as an initial charge and must come within the purview of the limitations provisions as set forth in Section 10(b).

If a contrary construction were permitted, the protection afforded by Section 10(b) could be easily frustrated in that the defendant would never be certain as to what activities would be subject to investigation and prosecution as long as any charges were on file. The Regional Director would then be permitted to issue a complaint based on activities not set forth in the charge, or related to the charge, and which may have occurred more than six months prior to the issuance of the complaint. Such could not have been the intention of Congress.

The Petitioner in its brief in this proceeding attempts to discount the *Globe Wireless* decision on the basis that the court was not presented with the precise question involved in this proceeding. However, it is clear from the language employed by the court in that decision that had the additional allegations as set forth in the complaint been based upon actions committed more than six months before the filing of the complaint, these allegations would have been held barred by the limitations provision of Section 10(b). If such were not the case, any reference to the six months period as it related to the enlargements would have been entirely superfluous. The nature of the enlargement was much the same as is involved in the instant case.

Where this court and other circuit courts have been presented with the question of the timeliness under Section 10(b) of unfair labor practice allegations set forth in the complaint or an amended charge, but not incorporated in the original charge, the courts have applied the "relation back theory" to test the validity of the new allegations in the complaint or the amended charges. In the application of this principle the courts have required

that in order for the additional allegations of unfair labor practices as set forth in the complaint to qualify under the limitation provisions of 10(b) where they cannot otherwise do so, they must bear a close relation to the violations of the Act as set forth in a timely filed charge or must more precisely define the allegations of the charge.

The Petitioner in this proceeding places great weight on the decision of this court in *N. L. R. B. v. Martin* (C. A. 9, 1953), 207 F. 2d 655, cert. den. ..... U. S. ....., 98 L. Ed. (Adv.) 392, but this decision is clearly distinguishable from the present question before this court and, in fact, adds support to the position of the Respondent. It is clear from that decision that the differences between the charge and the complaint were insignificant differences of description and not of substance. In rendering its decision, this court said:

> "Thus charge and complaint alike identified the allegedly illegal transactions by giving the names of the individuals concerned and the date of their dismissal. The difference between them is one of detail as regards the description of the activity engaged in."
>
> *N. L. R. B. v. Martin,* 207 F. 2d 655, 656.

The court in reaching its conclusion expressly acknowledged the relation back theory and concluded that the charge supplied "an adequate foundation for the complaint."

This theory has also received the endorsement of the United States Supreme Court in *Radio Officers' Union v. N. L. R. B.* (1954), 98 L. Ed. (Adv.) 251, 264. In that decision the Supreme Court expressly stated its agreement with the decision of the court below in *N. L. R. B. v.*

Gaynor News Co. (C. A. 2, 1952), 197 F. 2d 719, in which Judge Frank in speaking for the court stated:

> "This section has been uniformly interpreted to authorize inclusion within the complaint of amended charges—filed after the six months' limitation period —which *'relate back'* or *'define more precisely'* the charges enumerated within the original and timely charge." (Emphasis added.)
>
> *N. L. R. B. v. Gaynor News Co.,* 197 F. 2d 719, 721.

In its brief the Petitioner cites numerous decisions of the circuit courts in support of its position that the findings of violations of Section 8(a)(1), which were included in the complaint but not in the charges, were proper despite the provisions of Section 10(b) of the Act. These decisions and other decisions of the circuit courts are either distinguishable from the instant proceeding before this court or are in support of the position urged by the Respondent.

In the case of *Cusano v. N. L. R. B.* (C. A. 3, 1951), 190 F. 2d 898, the charge alleged a discriminatory discharge as being in violation of Section 8(a)(1). An amended charge alleging the same facts specified the discharge as a violation of Section 8(a)(3). The Petitioner asserted that the complaint, in so far as it was based on the amended charge, was in violation of Section 10(b) since the acts therein complained of occurred more than six months prior to the filing of the amended charge. This contention was rejected by the court, however, on the basis that the original and the amended charges were based on identical factual situations. The court noted that the employer upon being served with the original

charge would retain records, interrogate witnesses and otherwise prepare his defense to the unfair labor practices complained of in that charge; that the employer would not be prejudiced by deviations between the charge and the amended charge as long as the amended charge was sufficiently related to the original charge. Such was the test that court used to see if the new charge could be "related back." Contrasting the factual situation in the *Cusano* case to the situation in this case, it is clear that the Respondent would be greatly prejudiced by the additional allegations of unfair labor practices as set forth in the complaint over those that were specified in the charge and amended charges. The statements made by foremen, the speech made by Mr. Osbrink, and the questioning of employees would all be unrelated to the discharges. Evidence which would be vital for an adequate defense of the independent violations of Section 8(a)(1) might therefore be forgotten or destroyed during the period between the commission of these alleged unfair labor practices and the issuance of the complaint.

An extensive analysis of the doctrine of "relation back" was undertaken in the case of *N. L. R. B. v. Vare* (C. A. 3, 1953), 206 F. 2d 543. In that case the court refused to apply the relation back theory where new and different defendants were cited in the amended charge, as well as a different basis for discriminatory treatment than had been alleged in the prior charge. Since the amended charge did not comply with the time requirements of Section 10(b), it was dismissed. In interpreting and applying the relation back theory, the court said:

> "Unless the cases have taken all the teeth out of the six-months limitation provision of Section 10(b), it must operate to require dismissal here.

"Many cases have construed Section 10(b) to allow untimely amendments to timely charges when the amendments 'relate back' or 'define more precisely' or 'bring up to date' the unfair labor practices alleged in the timely charge. National Labor Relations Board v. Epstein, 3 Cir., 1953, 203 F. 2d 482, and cases there cited. To fit within that rationale, however, the untimely charge must be, at least, an 'amendment.' The 'amended' charges here are really new and different charges alleging new and different unfair labor practices against a new and different respondent."

N. L. R. B. v. Vare, 206 F. 2d 543, 546.

In *N. L. R. B. v. Dinion Coil Co.* (C. A. 2, 1952), 201 F. 2d 484, the charges specified several cases of unlawful discharge under Section 8(a)(3). The complaint issuing from the charge included other employees who were also alleged to have been discriminatorily discharged. The court held that the additional discharges as set forth in the complaint were properly before the Board. In so holding the court found that all the additional discharges were closely related to the violations specified in the charge and could therefore properly be considered by the Board even though they may have occurred more than six months before the issuance of the complaint. In so holding, it was said:

"The holding of these decisions may be summarized thus: (1) A complaint, as distinguished from a charge, need not be filed and served within the six months, and may therefore be amended after the six

months. (2) If a charge was filed and served within six months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge, if (a) *they are closely related to the violations named in the charge,* and (b) occurred within six months before the filing of the charge." (Emphasis added.)

N. L. R. B. v. Dinion Coil Co., 201 F. 2d 484, 491.

This opinion has been recently affirmed by the same court in *N. L. R. B. v. Pecheur Lozenge Co.* (C. A. 2, 1953), 209 F. 2d 393, and relied on in support of a holding that allegations in a complaint alleging a refusal to bargain were proper despite the fact that they had not been set forth in the initial charges which were concerned with violations of Sections 8(a)(1) and (3). It was noted by the court that the complaint in so far as it alleged a refusal to bargain was based upon statements contained in a letter, which letter also constituted the foundation of the Section 8(a)(3) violations.

In *N. L. R. B. v. Kobritz* (C. A. 1, 1951), 193 F. 2d 8, several charges alleging various unfair labor practices were filed. Among these charges was a second amended charge which claimed a refusal to bargain on the part of the employer in violation of Section 8(a)(5). The same allegation was not included in a third amended charge but was incorporated during the hearing in an amended complaint. Even though the allegations in the complaint supporting the Section 8(a)(5) violation were

barred by the six-month limitation period, the court sustained their validity. However, in doing so, great reliance was placed on the fact that the original Section 8(a)(5) charge had been timely filed and even though not included in a later charge there was nothing to indicate the withdrawal of the timely charge.

The decision of the court in *Kansas Milling Co. v. N. L. R. B.* (C. A. 10, 1950), 185 F. 2d 413, serves as an excellent illustration of the extent to which the Board will go in circumventing the purpose and intent of Section 10(b). In that case the original charge asserted in broad and general language that the company had restrained and coerced its employees and had discriminated in regard to hire and tenure and had refused to bargain in good faith in violation of the employees' rights under Section 7. The amended charge alleged that the company had threatened its employees with loss of seniority and their jobs if they engaged in a work stoppage and further threatened them with discharge unless they repudiated the union. By such a decision the court, for all practical purposes, eliminated any substance to the limitations provisions of Section 10(b).

The dangers of a liberal application of the relation back theory are also illustrated in the decision of *Cathey Lumber Company v. N. L. R. B.* (C. A. 5, 1951), 185 F. 2d 1021, where that court affirmed without opinion a decision of the National Labor Relations Board cited at 86 N. L. R. B. 157. In this ruling the Board stated that a complaint which alleged additional discriminatory

discharges than were set forth in the complaint was valid, but in doing so broadly interpreted their power to enlarge upon the charges in the complaint without heed to the limitations provisions of Section 10(b).

The decision of the Fifth Circuit in the *Cathey Lumber Company* case was approved by the same court in *Stokely Foods, Inc. v. N. L. R. B.* (C. A. 5, 1952), 193 F. 2d 736. In that case the charge alleged violations of Sections 8(a)(1) and (3) arising from certain discriminatory practices by the employer. The complaint added independent violations of Section 8(a)(1) based upon the employer's interrogating and threatening employees. These additional allegations were challenged by the employer as being barred by Section 10(b). The court, however, rejected these contentions on the basis of its prior decision in the *Cathey Lumber Company* case.

It is admitted that the factual situation involved in the *Stokely Foods, Inc.* case is similar to that presented to the court in this proceeding, but this court should not be bound by the decision of the Fifth Circuit since it is an erroneous application of the law as applied by the other circuit courts and the Congressional mandate as set forth in Section 10(b). Clearly, there can be no relation between independent violations of Section 8(a) (1) and incidental violations of Section 8(a)(1) arising from discriminatory practices. The *Stokely Foods, Inc.* decision may be further challenged in that it relies on the *Cathey Lumber Company* decision which itself is rendered with-

out opinion and therefore is of questionable precedent value.

In *N. L. R. B. v. Bradley Washfountain Co.* (C. A. 7, 1951), 192 F. 2d 144, the court affirmed the holding of the Board that unfair labor practice allegations in the complaint which were not set forth in the charge were valid. The court did not consider the matter of time limits as it might affect its holding.

The application of the principle of "relation back" is not new to the federal courts, particularly in cases involving the statute of limitations. The Federal Rules of Civil Procedure, Rule 15(c), is itself an application of the relation back theory in that the period of limitations for amended pleadings will date from the original pleading where the amended pleadings arise out of the conduct, transaction or occurrence set forth in the original pleading. While the courts have liberally applied the principle of relation back, an amendment will not be permitted where it introduces a new cause of action which otherwise might be barred by the statute of limitations.

See:

Frymier v. Mascola (C. A. 9, 1929), 31 F. 2d 107;

Cyclopedia of Federal Procedure, Sec. 1848, p. 238.

The difficulty frequently arises in determining what constitutes a new cause of action. A useful test has been established in that the courts will consider whether the proposed amendment raises issues which could not be adequately litigated without resorting to evidence not within the scope of the original complaint.

See:

Kansas Gas & Electric Co. v. Evans (C. A. 10, 1938), 100 F. 2d 549, cert. den. 306 U. S. 665, 83 L. Ed. 1061;

Cyclopedia of Federal Procedure, Sec. 1848, p. 242.

Applying the relation back theory to the instant proceedings it is apparent that the independent violations of Section 8(a)(1) as set forth in paragraph 4 of the complaint, namely, the alleged statements of supervision, Mr. Osbrink's speech to the employees and the interrogation of employees as well as the other events relied on by the Board in claiming the independent violation of Section 8(a)(1) bear absolutely no relationship to the matters complained of in the original and amended charges. It cannot be said that the complaint, in so far as it pertains to the independent violations of Section 8(a)(1), is an amendment of or necessarily grows out of the violations of Section 8(a)(3) as are contained in the charges. It is difficult to perceive how the events surrounding the discharge of the employees can also be construed as bearing any relationship to the events which are urged as supporting the independent violations of Section 8(a)(1). The factual background underlying the alleged discriminatory discharges is entirely unrelated and independent of the factual background relied upon in finding the independent violation of Section 8(a)(1). Since the allegations in the complaint cannot be justified under the relation back theory, those allegations must stand alone when put to the test of compliance with the limitation provisions of Section 10(b). They cannot gain support in this respect from the fact that the charges alleging the discriminatory discharges did comply with these time requirements.

II.

Any Statements Which May Have Been Made by Derry Smith, or Other Alleged Supervisors, Cannot Under the Law and the Evidence Be Attributed to Respondent.

The Board's original case attempted to fix responsibility upon Respondent for certain statements alleged to have been made by Mose Harris, Detroit Rushing and Derry Smith. The Trial Examiner and the Board found that Mose Harris and Detroit Rushing were not supervisors and that their interests were not identifiable with management. It was held, however, that statements made by Smith were attributable to Respondent. The exact basis of that holding is not clear. It is stated first in the Intermediate Report [R. 34] that Smith exercised supervisory authority; it was then stated that he is properly identified with management [R. 35]; and it was also stated that the employees would properly make such identification [R. 35]. These three statements could, of course, involve different standards, but the evidence and the law do not support the holding upon any of them.

The evidence shows that Smith was referred to by Respondent as a journeyman shake-out man, having the same status as others referred to as journeyman molders [R. 402-403]. The term "journeyman" was intended to only designate the best man for the job [R. 166, 33]. The shake-out work consisted of the very simple task of shaking the sand from the molds into which the casting had previously been poured, and after the casting had cooled [R. 283]. The Board's decision refers to this shake-out work as a "department" and at the hearing some of the participants referred to it as a department. However, the term "department" is incorrectly used and it would

be more correct to refer to the shake-out "crew" rather than "department" [see R. 274]. As the journeyman shake-out man, Smith had the duty of not only performing normal shake-out work itself but also of instructing new employees and showing employees what to do, how to do it and when it should be done [R. 403, 267]. Smith himself testified that he had never fired or hired anyone and to his knowledge no one had ever given him any authority to do so [R. 408].

A supervisor is defined in the Act, Section 2(11), as a person having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline employees or responsibly to direct them, to adjust their grievances or to effectively recommend such action *"if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."* There are many statements in the record that Derry Smith "transferred" employee's or that he "assigned" work, but there is not a word of evidence that such transferring or assigning was anything other than merely routine. There are also statements by the General Counsel's witnesses that Smith spent a substantial portion of his time "supervising." Such a term is a legal conclusion and the testimony of a witness that Smith "supervised" is worthless and is not probative evidence. The citations in the Board's brief in support of the contention that Smith was a supervisor are references to such testimony. Where the witnesses were specifically asked what they meant by the term "supervising," their explanation made it clear that the functions referred to were merely routine in nature, not requiring the use of independent judgment. Thus, witness Goynes testified for the General Counsel and on

cross-examination stated that Smith "was supervising" ninety per cent of his time. He was then asked what he meant by "supervising." He answered [R. 267] "showing the guys what to do, and what to do next, what bands to bring in, showing them how to get the sand and so on." Witness Monje said that Smith showed him what to do on the job, told him where to work, how to work and what to do [R. 223]. Witness Sanford testified that Smith showed him how to shake-out, where to find bands for the molders, how to go and get them and the size to get; he gave him instructions as to his job as a shake-out man [R. 257-258]. Witness LeFlore testified that Smith told him where he was to work, introduced him to the "fellows," showed him where various material which he would need was located, and showed him where to take cores to be sandblasted and heat treated. This was referred to by the witness and the General Counsel as "full and complete instructions" [R. 274].

If the court is to hold that such authority constitutes "supervisory" authority within the meaning of the Act, then we submit that ninety per cent of the Board's certifications of representatives are in violation of the Act since they would include supervisory employees. In every case these witnesses' testimony means nothing more than that Smith showed them what to do and how to do it and worked along with them leading the crew in a routine manner. There is not one act on the part of Smith which can be found anywhere in the record to indicate the necessity of independent judgment on his part. It is true that there was testimony that a foreman introduced a new employee to Smith with the statement that the employee was to take orders from Smtih. However, when the witness went on to describe the orders given by Smith

[see above references to record], it becomes clear that the orders were of a routine nature simply involving the function of leading a crew.

The Trial Examiner himself states that Derry Smith, as well as Mose Harris and Detroit Rushing, occupied a position analogous to "leadmen" [R. 33]. It is common knowledge that persons occupying such a position perform perfunctory and routine supervising work and are generally included in bargaining units certified by the Board. In short, they have always been considered as covered by the Act and not being a part of management. The General Counsel's witnesses who testified themselves called Smith a leadman in almost every case [R. 193-194, 232-235, 257, 272]. LeFlore was asked [R. 311] if he had ever heard Smith referred to as a supervisor and he answered "just referred to as leadman." While the witnesses sometimes use the term "boss" in referring to Smith, they used the term "leadman" equally as much and often used the two terms interchangeably.

In the case of *National Labor Relations Board v. Quincy Steel Cast. Co.* (C. A. 1, 1952), 200 F. 2d 293, the question was whether two employees classified as "coremaker and bench pouring boss" and "floor molder and assistant foreman" were supervisory within the meaning of the Act. Their work was at least more responsible than that of Smith in this case. Both the Board and the court held the employees to be non-supervisory occupying only the position of leadman despite their title. It was stated:

> "The Trial Examiner found 'that the pouring operation is a routine matter and while, as in practically every type of manufacturing process, there is a safety

> factor involved, the duties performed by Green and Dunn in this connection are not of such character as render them supervisors but rather, at best, leadmen of the pouring crews.' The legislative history of §2(11) tends to support the Board's view that certain employees with minor supervisory duties, such as straw bosses and leadmen, were not intended to be excluded from the coverage of the Act."
>
> *National Labor Relations Board v. Quincy Steel Cast. Co.,* 200 F. 2d 293, 296.

Mr. Rasp, Respondent's Superintendent, testified on cross-examination [R. 386-387] that while he considered Smith's judgment "pretty fair," he did not accept his recommendation on the men and that when Smith complained to him about an employee's inattention to work, Rasp would always check on it personally rather than accept Smith's judgment. He testified that Smith would complain to Rasp about some of the employees' work and that at times Rasp had asked Smith, in considering a pay raise, if an employee was "on the ball." Rasp's testimony is without contradiction or denial in the record. There is not any reason why Rasp should not be believed when he testified that Smith could not effectively recommend. Testimony as clear and unequivocal as Rasp gave on this point cannot be ignored.

It is clear that the rank and file employees (especially those allegedly intimidated by these so-called supervisors) considered Smith, Rushing and Harris to be one of themselves. In fact, LeFlore testified that Smith, Rushing and Harris were the principal "fellows" that he would talk to about the Union [R. 282]. Apparently LeFlore was attempting to convert Smith to his own way of think-

ing with respect to the Union, which certainly refutes the Trial Examiner's statement that "the employees would reasonably" identify Smith with management [R. 35]. Again, LeFlore testified [R. 310] that he removed a Union button "because my friends that were working around and working in there, *like Derry* and some of the other fellows," told him that he had better take it off because he would only be "intimidating" himself. The evidence contains other indications of the friendship of Smith with LeFlore and other rank and file employees. Also indicative of how the employees considered Smith is the fact that Smith went to see LeFlore at his home after he was discharged and was plainly sympathetic to LeFlore [R. 293-294].

We submit that there is not a word of evidence in the record to detract from the abundant indications therein contained that the employees considered Smith, Harris and Rushing as one of themselves and did not identify them with management. We further submit that, considering the record as a whole, the preponderance of evidence proves that Smith (as well as Harris and Rushing) at no time exercised any authority requiring the use of independent judgment. The record is devoid of any evidence that Smith could affect an employee's status, and the finding that Smith was a supervisor is one which is made squarely in the face of the preponderance of the evidence. The isolated statement in the Intermediate Report [R. 34] that Smith exercised "independent judgment" is without support or warrant in the record. While the Trial Examiner engaged in lengthy discussion on most of his conclusions, he does not refer to any testimony directly supporting that one, all important, statement.

Further evidence that Smith was considered as a rank and file employee is the fact that he was in the bargaining unit and voted in the election. It does not appear that his vote was challenged and this should now estop both the Board and the charging party from now questioning his status.

The last factor was considered as controlling on this question in the case of *N. L. R. B. v. Scullin Steel Co.* (C. A. 8, 1947), 161 F. 2d 143. The employees in question had at least higher authority than Derry Smith in the instant case, but yet were held not to be supervisory employees. The court stated:

> "The fact that *these employees were considered as eligible to vote at the election was tantamount to a ruling that they were not supervisory employees,* and they had a right to express their opinion at and prior to the election, and as their status was not changed that right continued subsequent to the election. It would be an anomaly to hold that they were employees entitled to vote for a representative, and then to hold that subsequent to the election respondent should be held liable for remarks made by them as to labor matters. These men may properly be characterized as key men, chosen for their ability from among the employees. It is not shown that additional compensation was paid them. They had no power to hire nor discharge. One was said to have the right to recommend the hiring of new men based upon his observation as to their competency. They were in no sense supervisory employees." (Emphasis added.)
>
> *N. L. R. B. v. Scullin Steel Co.,* 161 F. 2d 143, 149-150.

One of the leading cases of the Court of Appeals on this subject is that of *N. L. R. B. v. Arma Corporation* (C. A. 2, 1941), 122 F. 2d 153. The employees involved were referred to as "key men" or "straw bosses." In holding that they were non-supervisory, the court stated:

> "The key men were not supervisory employees in any proper sense, but were only an amorphous group of employees senior to small groups of from one to four apprentices or workmen junior in service to the key men, who were supposed to furnish leadership and advice to the juniors in a limited field. The key men, like the other workmen, were paid by the hour and received no additional compensation by reason of services rendered as key men as distinguished from their ordinary tasks, with the possible exception of a negligible bonus at Christmas. If such employees were not to be free to express their opinions and to urge fellow-workmen to organize in a certain way, the interest and activity of the most competent men in the appropriate bargaining group would be eliminated. The key men had no power to hire or fire apprentices assigned to them, or to recommend any of them for promotion. There was no evidence that the officers or supervisory employees consented that key men should represent the views of the corporation, or gave the other workmen reason to suppose that the key men worked for Independent in order to please Arma. If the latter had interfered with the labor activities of the key men, except to prevent canvassing during working hours, it surely would have been guilty of an unfair labor practice and would have deprived these men of rights guaranteed under Section 7 of the National Labor Relations Act, 29 U. S. C. A. §157."
>
> *N. L. R. B. v. Arma Corporation,* 122 F. 2d 153, 156.

The Board itself has generally held employees such as Smith to be non-supervisory. For example, in *In the Matter of The Solomon Company* (June, 1949), 84 N. L. R. B. 226, the Board held:

> "The Trial Examiner found the foreladies to be supervisors, on the ground that they had authority responsibly to direct other employees. In several recent cases, however, we have found individuals, although designated as 'foremen' or 'foreladies,' not to be supervisors within the meaning of the Act *where their relation to their fellow employees was that of master craftsmen to apprentices, and their regulation of the flow of work and the training of new employees was the result of superior experience rather than of authority.* The foreladies in the present case appear to us to be in the same situation. We therefore find that they are not supervisors within the meaning of the Act. On the record in this case we hold that the Respondents are not responsible for their activities in connection with the Union." (Emphasis added.)
>
> *In the Matter of The Solomon Company,* 84 N. L. R. B. 226, 227.

Also see *Kansas-Nebraska Nat. Gas Company, Inc.* (July, 1950), 90 N. L. R. B. 1423, wherein the Board held that chief operators were not supervisory employees and wherein their status was similar to that of the employees involved here.

Furthermore, the statements attributed to the alleged supervisors were indeed "straws in a haystack" when compared to the volume of conversation openly going on throughout the plant for a period of some months, and which even the Trial Examiner commented upon. The

totality of these statements is indeed lost in such a context, and it would seem that they would not be worthy of consideration in the light of the circumstances actually existing.

See:

N. L. R. B. v. Hinde & Dauch Paper Co. (C. A. 4, Dec., 1948), 171 F. 2d 240;

N. L. R. B. v. Hart Cotton Mills, Inc. (C. A. 4, July, 1951), 190 F. 2d 964.

The Trial Examiner apparently finds that one Watkins was also a supervisory employee. It may be that we are delinquent in our examination of the record, but careful search has failed to reveal a line of evidence upon which to base this finding of the Trial Examiner as set forth in the Intermediate Report, footnote 6 [R. 45]. Mr. Osbrink testified as to the managerial organization and described Watkins as doing Rasp's "legwork" [R. 459; 130]. Mr. Osbrink's secretary, in typing Respondent's Exhibit 3, indicated that Watkins was "assistant to Jimmy Rasp." Mr. Osbrink testified that he had told his secretary that she had made a mistake and that Watkins was not Rasp's assistant. The "assistant to Jimmy Rasp" was then stricken in ink and the words inserted "did Jimmy's legwork." Perhaps some point was made by the Trial Examiner of the fact that the writing was changed. If anything, it would seem that the admitted change would add credence to the fact that Watkins only did Rasp's "legwork" for if such was not the case, the document would not have been presented in the form in which it was. In any event, and whatever inference the Trial Examiner may have taken from this, we submit that there is no evidence anywhere in the record to support a finding that Watkins was a supervisor.

We submit that there is not substantial credible evidence on the record as a whole to support the finding that Smith and Watkins were supervisory employees of Respondent or that the rank and file employees considered them to be supervisorial or identified with management. The weight of the evidence manifestly supports the contrary finding.

III.

John L. LeFlore, Jr., and Archie Plummer Were Discharged for Cause.

A. John L. LeFlore, Jr.

LeFlore was originally hired by Respondent on September 16, 1951 [R. 270]. He was discharged January 15, 1952. The reason for his discharge was because of inattention to work, which included his activity of wandering around the plant talking to other employees without permission, which interfered with the work of others, and because he was careless in what work he did.

The Trial Examiner disagrees that such was the reason for his discharge and chooses to believe that he was discharged because of Union activity. The Board adopted his findings. The Trial Examiner's finding is not only without support of substantial evidence, but is, in fact, contrary to the weight of the evidence. In finding against Respondent, the Trial Examiner depends exclusively upon circumstantial evidence, with the exception of certain statements attributed to such alleged supervisors as Derry Smith.

He disbelieved Mose Harris, a rank and file employee, who testified as to LeFlore's disinterest and inefficiency in his work, simply because, according to Harris, LeFlore

was inefficient to the point of gross negligence, and the Trial Examiner could not believe that the Respondent would have as much patience as it did with an employee whose shortcomings were so great as those of LeFlore. Then the Trial Examiner reverses his measure in the same paragraph [R. 40-41] and discredits the testimony of another rank and file employee, Titus, because LeFlore's shortcomings, as described by Titus, were insufficient to warrant a discharge. Christensen, another rank and file employee and a Journeyman Molder, testified in great detail as to LeFlore's inefficiency and was peculiarly qualified to do so since he depended upon LeFlore in doing his own work [R. 426-429]. However, the Trial Examiner did not believe any of Christensen's testimony, apparently because Christensen testified that the molder (that is, himself) was the one held chiefly responsible for dirty castings and from which the Trial Examiner concludes [R. 41-42] that Christensen was simply blaming LeFlore in order to clear himself of responsibility. Another reason why the Trial Examiner apparently would not believe Christensen was because the latter had personal differences with LeFlore and one Goynes, and because Christensen "did not deny" that he had called Goynes a "nigger." Just what connection Goynes has in the Trial Examiner's mind with the matter involved here is not shown, but apparently he feels there is some connection between Christensen's failure to deny that he called Goynes a "nigger" and the credibility of his testimony with respect to LeFlore. The Trial Examiner then disposes of Christensen's testimony by assuming that Christensen's testimony was worthy of belief, but concluding that LeFlore had worked with Christensen for three weeks before Christmas of 1951, but had not been discharged until

January, 1952, so "obviously, therefore" [R. 42] the inefficiencies as outlined by Christensen had nothing to do with his discharge.

It should be noted that the testimony of Christensen, Harris and Titus was the testimony of rank and file employees who had no interest in the matter. By reasoning in a manner which ignores the realities of the situation, the Trial Examiner, with the Board's approval, has zigzagged through the evidence in such a manner as to avoid its effect. The Trial Examiner, in fencing himself off from the testimony of these credible witnesses by the use of hypertechnical standards, has run afoul of the Administrative Procedure Act and the National Labor Relations Act in that he did not consider all the evidence or find in accord with the weight of the evidence.

As a further example of this, the Trial Examiner points out every instance in which the General Counsel's testimony had not been denied or contradicted by Respondent, and apparently gives great weight to these. At the same time he fails to point out or give any weight to any instance wherein Respondent's testimony was not denied or contradicted by the General Counsel's witnesses. Yet, Mr. Rasp, Respondent's Superintendent [R. 348-349], testified that he many times had warned LeFlore about his shortcomings and although LeFlore was recalled to the stand only a few minutes after Mr. Rasp testified, he did not deny in any way Mr. Rasp's insistence that LeFlore had been warned by him, but this the Trial Examiner failed to note. The weight to be given his failure of denial is not measured by the failure to deny itself. Rather, the weight to be given to Mr. Rasp's testimony is determined in light of the fact that if Respondent was

of the mind to discharge LeFlore because of his Union activity, then obviously it would be utterly unreasonable for Respondent's Superintendent to repeatedly warn LeFlore of his shortcomings. Nor can it be contended that Rasp's testimony is not to be believed, since there is not one word of denial or contradiction in the record which could be fairly or reasonably pointed to as constituting a contradiction.

Mr. Rasp stated that he had personally observed, and was familiar with LeFlore's work [R. 352]. He stated that he personally had observed LeFlore [R. 353] and that he was not tending to his business, that he was chasing around the plant, not caring whether he did his work carefully or not, and bothering the employees [R. 353]. LeFlore was originally hired as a furnace man and was then transferred to the shake-out crew [R. 353]. Prior to his transfer Rasp testified that he had "called him down" (LeFlore) because of his conduct [R. 353-354]. After his transfer to the shake-out crew, Rasp still continued to observe his inattention to duty [R. 355]. He observed that he was still careless in his work, and that he got sand down the molds and his wanderings around the plant continued [R. 355]. Rasp testified he talked to him quite a few times and the molders were complaining to him that they had to shoulder LeFlore's work [R. 355]. After LeFlore's transfer to the shake-out crew, Rasp testified that he spoke to him "roughly half a dozen times or so" about his wandering away [R. 355]. He also spoke to him quite a few times about the carelessness in his work [R. 356].

On cross-examination Rasp testified that he had stood and watched LeFlore work, that he had been called there

to do so, and that this happened a couple of times a week at which times he would talk to LeFlore [R. 376-377]. Rasp also testified that he had seen LeFlore carelessly shift the molds and walk around them [R. 388]. He also stated that quite a few times he had seen LeFlore in other departments [R. 388].

When LeFlore went to the witness stand a few minutes after Rasp testified, he only denied that anyone had ever personally complained to him about getting sand in the molds [R. 493]. Moreover, he did not make any reference at all to Rasp's repeated testimony that he had warned LeFlore about his other shortcomings and no denial of that was ever made. LeFlore had testified weeks previously [R. 287] that none of the *leadmen* had ever made any criticism of his work. He clearly, however, was not including Rasp within that statement for at least we think it is clear that as Assistant Superintendent at that time he was in no way considered a leadman.

Derry Smith, whom the General Counsel contends was a supervisor over LeFlore, testified that LeFlore would leave the job and talk with other workmen; and that Smith had called this to his attention several times [R. 405]. He testified that this occurred about ten or twelve times while LeFlore was working with the shake-out crew [R. 405]. Harris, a Journeyman Molder, gave similar testimony [R. 442-443]. LeFlore was recalled to the stand shortly after this testimony from Smith and Harris, and despite the fact that he had, immediately prior to being recalled, heard these statements, he made no effort to deny them. He did, of course, deny [R. 495-496] that he had "a habit of wandering around in the plant when you weren't supposed to." However, he did not deny that

either Smith or Rasp had warned him about such wanderings on any occasion.

The Trial Examiner, in considering this uncontradicted and undenied testimony of Rasp [R. 43], was able to find reason to not believe it because of the *"undenied* and credible testimony" of LeFlore to the effect that Smith had directed LeFlore to break in Smith's brother who was a new employee. In other words, Rasp's and Smith's undenied testimony was discredited because Smith had not denied that he had told LeFlore to "break in" a new employee. The employees involved were performing common labor, and to have LeFlore show a laborer what the job required does not support the conclusion the Trial Examiner draws from it. Further reason to not credit Rasp's testimony seems to be the fact that Rasp "first testified that LeFlore was transferred to shakeout to 'snap him out of it' and then admitted that the transfer was made at LeFlore's own request" [R. 43]. The Board's opening brief (pp. 10, 25) seems to make much of this. To indicate the superficiality of the Examiner's consideration of Respondent's evidence and the highly technical standards by which he measured it we quote for the court's consideration the full testimony on which the Examiner's observation was based:

> "Q. (By Mr. Benedict): Now, at first he was on one of the furnace banks, wasn't he? A. He was a furnace man, that is, then we put him as a helper to see if we couldn't snap him out of it so he would be—
>
> Q. To what department was it that you put him on? A. Into the foundry as a shake-out man.
>
> Q. Did you place him in the shake-out department at his request or not? A. I think it was at his

request, that he had some reason to believe the work was easier, so probably that was the reason." [R. 353.]

There is nothing inconsistent with LeFlore's asking for a transfer, and the Superintendent granting it "to snap him out of it."

The Trial Examiner further points out, as casting doubt on the credibility of Respondent's witnesses [R. 43-44], the failure on their part to reveal any incident occurring immediately prior to LeFlore's discharge which could be said to have "touched off" the discharge. The Trial Examiner, in other words, assumes that all discharges are necessarily touched off in the same manner as an explosion; that is, that it is a spontaneous decision. He does not conceive that it could be a cumulative matter building up gradually over a period of time. Both Rasp and Smith while testifying that they were constantly warning LeFlore, were not able to recollect the dates such warnings had been given or what was the latest warning prior to the discharge. Their honesty is indicated by their inability to name the date on which they had last warned LeFlore. Cases could be cited wherein a Trial Examiner disbelieved a Company's witness because the Company's witness was *too specific* in just such matters as dates, times, and the content of conversation, and such "specificity" demolished their credibility. After going on at some length in such reasoning, the Trial Examiner then begins to speculate as to the reason of the discharge of LeFlore [R. 44] and observes that "A more likely explanation than any of those advanced by the Respondent" is that on January 2, 1952, the Board directed an election; whereupon he feels it must have become evident

to Respondent that the day of decision was reached, and that the time for drastic action was overdue. However, the Trial Examiner seems to have no difficulty with the fact that it was exactly thirteen days after the direction of election before LeFlore was discharged. We submit that such gratuitous speculation on the part of the Trial Examiner is not only a denial of due process and a fair hearing to this Respondent, but it is of such nature as requires that the entire Intermediate Report be stricken and another opportunity afforded Respondent to attempt to find a trier of facts who will fairly listen and impartially weigh the evidence and confine itself to fact.

We wish to point out very clearly that according to the witnesses which the Trial Examiner believed, the conduct of LeFlore in supporting the Union was overt, manifest and unconcealed almost from the day of his employment. The Trial Examiner stated that the election was discussed freely in the plant [R. 37], and it is clear that LeFlore expressed his support for the Union repeatedly to persons whom the Trial Examiner found were supervisors, and to a number of others whom the General Counsel contended were supervisors [R. 45]. The Trial Examiner concludes that LeFlore's support for the Union was so active that Respondent must have been advised concerning it. If that is true, the Trial Examiner fails to accord any weight to the fact that Respondent retained LeFlore in its employment for four months while LeFlore was expressing such overt support for the Union; and through a period of time when it is undenied that he was repeatedly warned by Rasp and Smith to give better attention to his work and to stop wandering around the plant.

In considering the evidence relating to LeFlore's discharge, the Examiner gave the first five pages of the Record [R. 39-44] to explaining why he does not believe Respondent's testimony. He then concludes in approximately one page [R. 44-45] that the discharge was because of Union activity. Other than disbelieving Respondent's witnesses, the only matters on which the decision seems based are:

(a) LeFlore was the most active in support of the Union;

(b) Since his activity was open, there can be "no doubt" that Respondent was advised concerning it; and

(c) Respondent had a strong bias against a bargaining relationship with the Union.

From these the Examiner concluded that LeFlore's Union activity was the reason for his discharge.

After coming to that conclusion the Examiner remarked that he was "strengthened" in this conclusion by certain statements of Watkins and Smith to the effect that LeFlore's discharge resulted from Union activity. Indeed, such a conclusion could not be based upon those statements since the evidence would not indicate that Smith or Watkins were speaking of their own knowledge. So far as appears, their alleged statement as to the reason for LeFlore's discharge was no more than their own speculation. As also indicative of an unlawful motive, the Trial Examiner then pointed to the Respondent's "reluctance" to afford LeFlore any explanation for the discharge. It appears that Watkins, who notified LeFlore of his discharge, told LeFlore that Rasp, the plant

superintendent, had told Watkins to inform LeFlore that he was discharged and to give him his pay check. LeFlore, unable to find Rasp, found Mr. Osbrink, and Mr. Osbrink advised him that he did not know anything about Mr. LeFlore's discharge and referred him to the plant manager [R. 285-286]. Mr. Beals had no information on the matter either but said that he would find out for LeFlore [R. 286]. LeFlore called the plant manager the following day and was advised that the manager had as yet been unable to contact Mr. Rasp. Later the same afternoon LeFlore called against and the manager told him that he had been discharged and told him the reason for his discharge [R. 486]. This evidence should be weighed in the light of the fact that LeFlore was a laborer who undeniedly had been warned by Rasp, the superintendent, on many occasions as to his shortcomings. In those circumstances there could hardly have been any substantial question in LeFlore's mind as to why he was discharged and, realistically appraised, there is no basis for the Examiner's observation with respect to the "reluctance" of Respondent to inform LeFlore as to the reason for his discharge.

B. Archie Plummer.

Archie Plummer was first employed by the Respondent in June 1951, as a metal pourer [R. 311]. He was discharged on February 29, 1952 [R. 323]. The Labor Board election had previously been held on January 25, 1952 [R. 10]. The reason for his discharge was because he was lax and unsatisfactory in the discharge of his duties, and his attendance and punctuality had been unsatisfactory for several months prior to his discharge [R. 357-358, 477-478]. The Trial Examiner has found

that the reason Respondent discharged Plummer was because of his Union activities. This finding lacks the support of substantial evidence and a finding to the contrary is the only one that would have such support.

In order to reach his finding as to Plummer's discharge the Trial Examiner is forced to rely on his previous finding that Watkins was of managerial status [R. 49], which is clearly an erroneous finding as pointed out under point II of his brief. In that connection the Examiner points out [R. 49] that Watkins is listed on Respondent's "management chart as assistant to Foundry Foreman Rasp." The statement is manifestly incorrect. There was no "management chart" put into evidence or even described. The Examiner may be referring to a scrap of note paper used by Mr. Osbrink to refresh his recollection in testifying. His secretary had typed a list of management personnel with their titles, and beside Watkins' name had typed "assistant to Jimmy Rasp." Mr. Osbrink had told his secretary that the description of Watkins was not correct, and had her mark it through and add in longhand, "Did Jimmy's Leg Work" [R. 457-459, 470-472; also see R. 130]. The Examiner thus ignores the witness' sworn testimony and chooses to say that Watkins was listed on this note paper as "assistant" to Foundry Foreman Rasp—thereby accepting the statement of the secretary who typed it, and who gave no testimony with respect to it. The Examiner thereby rejected sworn testimony on the basis of hearsay. The Board adopted his finding. In fact, the Board's supplemental decision, footnote 4 [R. 104], in answer to our contention that there was not a line of evidence to support the finding that Watkins had supervisory status, said, "However, R. H. Osbrink included Watkins' name

in a list of top management personnel." The Board pointed to no other evidence, and we submit that its conclusion draws more from this scrap of note paper than is there, at least so far as concerns Watkins who was described on the paper as "Did Jimmy's Leg Work."

Moreover, in finding that Palmer was not discharged for cause the Trial Examiner has, as in the case of LeFlore, failed to consider the testimony of Walker, Mose Harris and Jimmy Rasp. The basis upon which the Trial Examiner rejects the testimony of Harris and Rasp is not sufficient. Harris' testimony was discredited for the same general reasons as in the case of LeFlore [R. 51]. Rasp's testimony to the effect that he had personally observed Plummer's deficiencies, that he had authorized his discharge, and that Plummer had been discharged for inattention to work and abstenteeism [R. 357-358], was discredited apparently because the Examiner felt that certain contradictions in his testimony made it useless. The contradictions which the Trial Examiner attributes to Rasp's testimony are not present in the magnitude that he makes it. It is obvious that the witness was confused and we do not deny it. It is equally obvious that confusion (and not contradiction) is the explanation of the matters pointed out by the Trial Examiner. Indeed, some of the matter which the Trial Examiner points out as being contradictions can be construed as such only by distortion of plain meaning. Thus, the Trial Examiner sets forth quotations from Rasp's testimony containing the alleged conflicts and contradictions [R. 52-54]. He points out that Rasp "first testified that he himself authorized Plummer's discharge." He then sets forth the witness' testimony in two statements.

The first was, "I personally authorized * * * his discharge." He then sets forth another statement which was, "I did not discharge Archie Plummer." There is no contradiction or conflict in those two statements. To authorize a discharge implies only that the person did no more than authorize and did not himself carry it out. The two statements are consistent and the implication that there was a contradiction is unjustified.

The Trial Examiner also quotes Rasp's testimony to the effect that he did not know, at the time Plummer was discharged, that he had been an observer for the Union in the election, that he knew it after the election but not when he had dismissed him. Of course, the discharge occurred on February 29 and the election was January 25, and the witness was confused as to which had occurred first. The portions of the evidence which the Trial Examiner did not quote in his Intermediate Report are revealing as to the nature of the confusion, and cannot fairly be left unnoticed:

> "Trial Examiner Spencer: Read the question—read the answer, Mr. Reporter.
>
> (Answer read.)
>
> Trial Examiner Spencer: What do you mean by that?
>
> The Witness: Well, he was—
>
> Trial Examiner Spencer: I just want to know what your answer means, that you found out after this election we had.
>
> The Witness: He was a witness of the counting of the votes and I was also a witness. That way I connected the gentleman with the union.
>
> Trial Examiner Spencer: Is that what you meant by your answer?

The Witness: Yes.

Q. (By Mr. Reiner): He was a witness at the counting of the votes concerning the election? A. Yes.

Q. So that it was at that time that you discovered that he was the observer for the union? A. Yes." [R. 360-361.]

The witness therefore testified that he was aware on the day of the election that Plummer was a "witness" of the counting of the votes since he also was such a witness. The use of the word "observer" by the cross-examiner and the word "witness" by Rasp is a difference in terminology which explains much of the confusion. Indeed, there is a difference under the Board's rules of who is an observer and who may witness the counting of ballots, and the Trial Examiner himself confused the two by erroneously stating in his decision that Rasp served as the Respondent's observer at the election [R. 52]. Respondent was not the observer although he was a witness to the counting of the ballots. (See Certification On Conduct of Election bearing signatures of observers [R. 10].)

The quotations from the record in the Intermediate Report also omit the following observation which we think should be considered in evaluating the nature of the confusion:

"Trial Examiner Spencer: I don't think the witness has your question firmly in mind, apparently." [R. 361.]

The questions were then rephrased and the witness acknowledged [R. 362] that he had mistakenly confused

the order of dates between Plummer's discharge and the date of the election.

The Trial Examiner then quotes excerpts to the effect that the witness did not discharge Archie Plummer. He was then asked if he knew anything about the discharge of Archie Plummer, to which he answered "No, not exactly when that happened." This excerpt, lifted from the context from which it was made, is utterly unfair. The word "that" in the answer just quoted did not refer to the discharge of Plummer as such. It referred to a telegram [Union Ex. 2] which the cross-examiner was showing the witness and the witness meant that he didn't know anything about the sending of the telegram. At the expense of overburdening this brief with such detail, we wish to quote in italics the material which places the testimony in proper context and follow that with the excerpt quoted by the Trial Examiner to illustrate that the Trial Examiner considered the testimony out of context:

> "Q. *I show you Union's Exhibit No. 2. Did you give orders to send out that telegram?*
>
> Mr. Benedict: *Objected to as not proper cross-examination. It was not discussed on direct examination.*
>
> Mr. Nutter: *It goes to the reasons for his discharge. This is one of the issues in the case.*
>
> Trial Examiner Spencer: *Well, I will let him answer. You may answer.*
>
> The Witness: *I don't believe I was directly responsible for this. I think that Clary Tarrant was. I am not sure.*
>
> Q. (By Mr. Nutter): Did you tell Clary Tarrant that you discharged Archie Plummer? A. I did not discharge Archie Plummer.

Q. Do you know anything about the discharge of Archie Plummer? A. No, not exactly when that happened.

Q. Pardon? A. *Not exactly when that happened.*

Q. *Then you didn't know why he was discharged, is that right?* A. *I know why he was discharged.*

Q. Did you tell anybody to discharge him? A. Not actually.

Q. Who did discharge him? A. Clary Tarrant.

Q. Did he talk to you about it? A. Yes, he did.

Q. *Do you remember whether he said anything about sending him a telegram?* A. *No, I don't believe there was any telegram mentioned.*

Q. *Did he say anything about no more work available?* A. *I don't remember.*

Q. *You see what the telegram says, 'No more work available. Please bring in badge and pick up checks?'"* (Emphasis added.) [R. 390-392.]

The exhibit shown the witness was a telegram notifying Plummer of his discharge [R. 339]. In common parlance the notice of discharge is often called "the discharge." A fair appraisal of this testimony will not afford any basis for a conclusion that Rasp said he didn't know anything about the discharge. The excerpt when fairly construed clearly means that he did not know anything about the sending of the telegraphic discharge notice.

The Trial Examiner then quotes the questions as to whether Clary Tarrant was working "at the time Mr. Plummer was discharged," to which the witness answered that he believed that Tarrant "wasn't there." The Trial Examiner in a discussion preceding this quotation [R.

52] points out that Rasp admitted that he was not certain if Tarrant "was in Respondent's employ at the time of Plummer's discharge * * *." This was not the witness' statement. The witness only said that Tarrant was not working at the time Plummer was discharged. The statement does not afford a conclusion that the witness meant that Tarrant had left Respondent's employ. The statement could well mean that Tarrant was simply not working on the day that Plummer was discharged. At the conclusion of these excerpts the Trial Examiner points out that, "Obviously, no reliance whatever" can be placed on Rasp's testimony. We agree that Rasp's testimony must be weighed in the light of the fact that he was confused as to certain objective facts such as the sequence of events and the identity of persons with whom he talked. Confusion as to objective fact cannot justify a Trial Examiner's action in discrediting all of the witness' testimony on which he was not confused and on which he was not contradicted. Thus, if we take our attention from the witness' confusion over these objective facts which hardly seem important, it is obvious that the witness still testified without confusion and contradiction, that he authorized the discharge of Plummer, that he did so because of Plummer's inattention to duties, poor work record and his absences without permission, and that he had not been discharged because of his Union activity [R. 357-358, 362].

In comparison to the Examiner's treatment of Rasp's testimony, we should observe how he explains away inconsistencies in the testimony of Plummer [R. 49, footnote 8]. Thus, Plummer testified that his absence was authorized by Watkins and he testified that it was authorized by Walker. The Trial Examiner explained this by saying,

"He obviously was referring to the fact that Watkins was standing close by and in what he thought was hearing distance when Walker gave his consent." That statement by the Trial Examiner can be appreciated only in light of the knowledge that Walker flatly denied that he had had any such conversation with Plummer. We do not mean that the Trial Examiner's explanation of Plummer's confusion is not justified. We only mean to illustrate that if the Trial Examiner applied the superficial and hypertechnical standards of examination which were used in the testimony of Rasp, he would as easily have discredited the testimony of Plummer. Indeed, if we are to use such standards there is no credible evidence anywhere in this record.

The Trial Examiner concluded as to Plummer [R. 54-55] that he was discharged because of his Union activity. As in the case of Le Flore, the Trial Examiner states his conclusion and the evidence supporting it in approximately one page of the record, after devoting the preceding several pages to explaining why he did not believe the Respondent's evidence. The reasons which the Trial Examiner seems to give for his conclusion are: (a) Watkins did not testify; (b) Rasp's testimony was so confused that it can be ignored; (c) this leaves only Plummer's testimony as to the actual circumstances attending the discharge.

From these "and in the light of this record" the Examiner concluded that the only reasonable inference that could be drawn was that Plummer's partial absence on the day of his discharge was a pretext to cover the real cause—his advocacy of the Union both before and after the election.

The testimony of Plummer, referred to by the Examiner, was to the effect that on the day he was discharged he had reported for work late but that this had been pursuant to permission granted by Walker, his leadman [R. 320]. When Watkins questioned him about his tardiness Plummer testified that he answered that he had told Walker he was going to be late and that he (Watkins) had been standing nearby. He testified he had asked Watkins if he had not overheard the discussion with Walker [R. 320]. Walker flatly denied that Plummer had ever asked him for permission to be tardy, or that he had ever given such permission [R. 483]. Watkins, whom Plummer alleges overheard this conversation, was present in the hearing room and his presence was pointed out to the General Counsel by counsel for the Respondent, but the General Counsel declined to call Watkins [R. 501]. The Trial Examiner had previously pointed out [R. 50] that he was unable to credit Walker's denial "in the absence of corroborative testimony from Watkins." In the case of a conflict of testimony such as occurred between Walker and Plummer, the Trial Examiner could properly credit either witness and, indeed, it is his responsibility to do so where the conflict is relevant. However, the Examiner here did not make a decision as to credibility between Walker and Plummer. He merely decided to disregard Walker's testimony since it had not been corroborated by that of Watkins. This is not a proper standard to credit the testimony of witnesses and it obviously ignores the fact that the burden of proof is upon the General Counsel and not upon the Respondent. Watkins was not employed by Respondent at the time of the hearing [R. 130].

There was other evidence which the Trial Examiner and the Board wholly failed to consider. Thus, Plummer testified that commencing in November, 1951, when he became interested in the Union, he openly supported the Union [R. 322-323]. The Trial Examiner himself remarked that Plummer had been open in his interest in Union representation, even in the presence of those whom the General Counsel contended were supervisory employees [R. 48]. In the case of LeFlore, the Trial Examiner reasoned that since LeFlore had been open in his support of the Union, the timing of his discharge, shortly before the election, was evidence that the discharge was for Union activity. The same reasoning as applied to Plummer would lead to the conclusion that his discharge was *not* for Union activity since he also was openly in support of the Union, and he was not discharged until over a month following the election. At the time of Plummer's discharge, unfair labor practice charges with respect to LeFlore and others had been filed. The Union had lost the election and it would hardly seem reasonable that in such a context the Respondent would discharge other employees to discourage Union activity. It must be remembered that with the Union having lost the election, Union representation was foreclosed for at least a year since the Act prohibits the holding of more than one election during that period of time.

Also, the Examiner did not consider Respondent's Exhibit 1 which was a document signed by Plummer to obtain unemployment compensation and on which he stated the reason for his discharge as being "not calling in when off from work." He also gives no consideration to Respondent's Exhibit 2, the medical report, with respect

to an injury received by Plummer on January 14. On February 5, 1952 the doctor treating Plummer made the notation "able to return to work." However, Plummer did not return to work until seven or eight days later [R. 326-327].

The testimony of Walker, Plummer's leadman, to the effect that Plummer had a habit of wandering away from his job and that he, Walker, had warned him that he would lose his job for such conduct was referred to by the Examiner but he apparently gave it no weight.

Also ignored by the Examiner in rejecting the Respondent's contention that the reason for Plummer's discharge was, in part, based upon his absenteeism and tardiness, was the testimony that the Respondent had the policy of discharging employees for absenteeism or tardiness only after taking into account their record for cooperation, quality of work and application [Tr. 165-166]. Thus, the absentee record of other employees which was put into evidence becomes of aid only in the light of that policy.

The conclusion of the Trial Examiner with respect to Plummer is based not upon probative evidence, but is essentially based upon the failure of Respondent to call Watkins as a witness and upon the Trial Examiner's own disbelief of Rasp. Indeed, his opinion virtually admits as much [R. 54-55]. The conclusion with respect to Watkins is improper for it ignores the fact that the General Counsel has the burden of proof. The conclusion with respect to Rasp is baseless for the disbelief of a witness, even if the disbelief is justified, may never be considered as affirmative evidence to the contrary of that which was not believed.

C. Conclusions With Respect to the Discharges.

Congress, in enacting the 1947 amendments to the National Labor Relations Act, gave clear evidence that the Board had gone too far under the label "expertness" in the inferences drawn from evidence and in making findings. The inclusion in the amended Act of requirements that the Board's finding be supported by substantial evidence and that the findings be based upon the evidence in the record as a whole have been interpreted by the courts as a mandate to them to exercise a more strict scrutiny in reviewing the Board's findings.

Universal Camera Corp. v. N. L. R. B. (1951), 340 U. S. 474, 95 L. Ed. 456.

The courts have, accordingly, enlarged its function in reviewing findings of the Board. Indeed, this court was one of the first to state that it would require the Board's findings to be supported by substantial evidence on the record as a whole, and this was held even before the amendments.

See:

N. L. R. B. v. Union Pacific Stages (C. A. 9, 1938), 99 F. 2d 153.

The recent case of *United Packinghouse Workers v. N. L. R. B.* (C. A. 8, Feb. 1954), 33 L. R. R. M. 2530 (as yet not officially reported) is very much in point. The court had before it the question of whether the Board's finding that certain employees were illegally discharged was supported by substantial evidence. In holding that they were not so supported, the court made the

following statements which are equally applicable to the instant case:

> "As has been observed the burden of proof to establish affirmatively by substantial evidence that the discharges or refusals to reinstate were because of union membership and activities and for the purpose of discouraging membership in the union was upon the Board and this burden at no time shifted to the company. The fact that the employer may introduce evidence tending to show other reasons for discharge or refusal to reinstate does not mean that the employer has the burden of proof of establishing such alleged cause but the evidence is admissible and pertinent because it tends to disprove the allegations of the complaint. But whether such evidence be introduced or not it is still the duty of the Board to prove the allegations in the complaint by substantial evidence. There was evidence tending to prove that each of these employes, save five discharged for other reasons, participated in unprotected activities during the strike. True, the trial examiner found the evidence insufficient to sustain that charge. He did so by discrediting positive testimony in many instances and by crediting the negative testimony of the employee. The uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive testimony offered on behalf of the employer regardless of the fact that the evidence of the employer was corroborated in most instances by the surrounding facts and circumstances, convinces us of his bias and hostility.
>
> * * * * * * * *
>
> "The manifest prejudice, bias and hostility of the examiner as disclosed by an examination of the rec-

ord goes far to weaken or destroy the presumption of correctness usually attributed to the findings of the trier of facts. A study of the entire record indicates that this bias and hostility prevailed not only in the weighing of the evidence but in the ruling of the court in rejecting pertinent evidence offered by the company.

* * * * * * * *

"Since the decision of the Supreme Court in Universal Camera Corp. v. N. L. R. B., 340 U. S. 474 . . ., it is incumbent upon this court in cases here on petition for review of an order of the National Labor Relations Board to consider the conflicting evidence and if it is our duty to consider it then we must pass upon its weight."

United Packinghouse Workers v. N. L. R. B., 33 L. R. R. M. 2530, 2532, 2533.

The Trial Examiner in the last cited case had not placed the burden of proof upon the employer expressly, but his method of examining the evidence had done so in effect. In the instant case the Trial Examiner has done the same to an equal degree.

Another case to the same effect is *Indiana Metal Products Corp. v. N. L. R. B.* (C. A. 7, Mar. 1953), 202 F. 2d 613. The court there stated:

"The burden was on the General Counsel of the Board to prove affirmatively, by substantial evidence, that Meyer's discharge was due to union activities. N. L. R. B. v. Reynolds International Pen Co., 7 Cir., 162 F. 2d 680, 690; Interlake Iron Corp. v. N. L. R. B., 7 Cir., 131 F. 2d 129, 134. In the latter case, this court, in an opinion by Judge Minton, said, 'The company does not have to prove nondiscrimination

because of union activities. The Board must prove discrimination because thereof. This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board. [Citing.]'

* * * * * * * *

"The Board's decision states, 'Like the trial examiner, we are not convinced by the explanation offered by the respondent for Meyer's discharge.' The Board's approach seems to be that the burden of proof was upon the company."

Indiana Metal Products Corp. v. N. L. R. B., 202 F. 2d 613, 616, 617.

The *United Packinghouse Workers* case and the *Indiana Metal Products Corp.* case seem to also support the proposition that the Trial Examiner's disbelief of the reason given by the employer for the discharge not only does not shift the burden of proof to the employer—it also does not constitute evidence, even of a circumstantial nature, that the reason for the discharge was one which would make it illegal.

In *Hazel-Atlas Glass Co. v. N. L. R. B.* (C. A. 4, Mar. 1942), 127 F. 2d 109, the court said on that precise point:

"There was no direct evidence that the complainants were discharged for union activities. All the direct evidence was to the contrary; and the Board reached its conclusions by rejecting the direct evidence as false and by drawing certain inferences from the evidence that remained. It is the sufficiency of the latter evidence that must now be considered, for it is obvious that the mere rejection of the em-

ployer's denials as perjury does not take the place of affirmative evidence of wrong doing."

Hazel-Atlas Glass Co. v. N. L. R. B., 127 F. 2d 109, 114-115.

The court in the *Indiana Metal Products Corp.* case also held (at p. 617) that "timing" of a discharge in relation to other events was not evidence. In the instant case the timing of LeFlore's discharge as being subsequent to the direction of election was considered as being "a more likely" reason for the discharge.

The Trial Examiner's finding with respect to Plummer's discharge is wholly dependent upon the failure of Watkins to be called as a witness. To attribute such weight to the failure to call a witness is in effect to place the burden of proof upon the Respondent. In *N. L. R. B. v. Ray Smith Transport Co.* (C. A. 5, 1951), 193 F. 2d 142, the court was confronted with the same finding. The General Counsel's witness testified to a certain conversation with one Hillin who apparently had some connection with the employer and who was not called to deny or explain the conversation. The Trial Examiner indicated that since the respondent had not offered Hillin to dispute the testimony it should be taken against him and to the effect that if Hillin had testified he would have supported the testimony already given. In rejecting this method of analysis, the court stated:

"We know of no principle on which such a ruling could rest, except the principle of suspicion and conjecture and the willingness to believe the worst of one against whom a charge has been made."

N. L. R. B. v. Ray Smith Transport Co., 193 F. 2d 142, 145.

The testimony of rank and file employees who have no apparent interest at stake was completely ignored by the Trial Examiner. Thus, the testimony given by Mose Harris, Uries Walker, Clifford Christensen and Columbus Titus, as well as by Derry Smith and Jimmy Rasp, was all discredited upon one basis or another. Most of the rejected testimony was without conflict or contradiction. The sworn testimony of witnesses cannot be so lightly tossed aside. The ease with which the Trial Examiner did so is the measure of the consideration he gave it. In doing so he does not fairly consider the evidence nor does he consider it "as a whole." While it is the function of the Examiner to weigh the evidence and credit one witness' testimony as against the other, the courts have consistently held that this does not give him license to ignore.

In *N. L. R. B. v. Russell Mfg. Co.* (C. A. 5, Sept. 1951), 191 F. 2d 358, the court said:

> "Such sworn testimony cannot be arbitrarily disregarded on the assumption that he was lying."
>
> *N. L. R. B. v. Russell Mfg. Co.,* 191 F. 2d 358, 360.

In *American Smelting & R. Co. v. N. L. R. B.* (C. A. 8, Mar. 1942), 126 F. 2d 680, the court said with reference to the Board's refusal to accept the testimony of the employer's superintendent:

> "There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point."
>
> *American Smelting & R. Co. v. N. L. R. B.,* 126 F. 2d 680, 688.

Finally, the Trial Examiner's finding is supported in his mind by certain statements concerning the discharge made by those alleged to be supervisors. The weight the Trial Examiner gives those statements cannot be approved, even if it were true that they were made by supervisory employees. The evidence is clear that if they are supervisory employees they are only technically so, and not the type employee who would normally be assumed to have authority to speak for the employer or to have actual knowledge of the reason for the discharge. Statements made by such employees are not entitled to weight because there is no evidence that they were doing any more than voicing their own speculative opinions. This means the findings are based upon incompetent evidence. In *Pittsburgh S. S. Co. v. N. L. R. B.* (C. A. 6, Feb. 1950), 180 F. 2d 731, affirmed (1951), 340 U. S. 498, the court made the following observation:

> "Certain wholly incompetent testimony was admitted to the effect that Shartle was discharged because of union activity. After his discharge Shartle talked to the men on the ship, the electricians, the firemen, the oilers, the coalpassers, the steward, the second cook, the porter, the deck hands, the deck watch, and the watchmen, and asked them whether he was competent. He said they assured him that he was, and that he was discharged for union activity. Reading the case in the light of the whole record, we conclude that Shartle was discharged for cause and that the finding that he was discharged because of union activity is not supported by reliable, substantial, and probative evidence."
>
> *Pittsburgh S. S. Co. v. N. L. R. B.,* 180 F. 2d 731, 740-741.

IV.

The Proceedings Were Not Conducted in Accordance With the Requirements of Law.

Much that has already been said with respect to the Intermediate Report could be repeated here and cited as a denial of due process as well as evidence of partiality and bias. We mention only a few of these with but brief discussion.

The real evidence upon which the Trial Examiner acted was not the evidence appearing on the record but the reaction in his own mind from his disbelief of Respondent's witnesses. This is illustrated by his discrediting Christensen's testimony because (among other reasons) Christensen had not denied that he had called a third party, in no way connected with the proceeding, a "nigger." This reference by the Trial Examiner is nothing less than astounding. He uses the failure to deny as evidence of the matter not denied. Further evidence of the Trial Examiner using an intangible suspicion as evidence was his manner of resolving the conflict between Walker and Plummer. The Examiner made it clear that he was believing Plummer not because he credited Plummer over Walker, but solely because Watkins had not testified. In that context the failure to call the witness is not evidence and, if nothing else, it does not observe the requirement that the burden of proof is upon the General Counsel.

The Trial Examiner also based his conclusions upon wholly incompetent evidence. Some of the instances in which the Trial Examiner did so are so extreme in nature that they indicate willingness to use any type of evidence against Respondent. Thus, there is a conflict as to whether or not Derry Smith had stated to employees that Mr.

Osbrink had told him he would close the plant if the Union won the election. The Examiner states that while Smith denied the statement, other witnesses, who convinced the Trial Examiner, testified that he had made the statement,

> ". . . and that such a statement was made is further confirmed by the fact that the Union caused to be distributed circulars in which the employees were told that the Respondent could not close its plant even if it chose to do so because of the nature of the defense contracts under which it was operating." [R. 35-36.]

Thus, we have here a finding based upon the most obvious type of hearsay. A handbill distributed by a Union in an election campaign is used by a Trial Examiner to prove the truth of the statements made in the handbill; and in the particular instance to prove that Derry Smith had made the statement that Mr. Osbrink would close the plant if the Union won the election. However uninformed an Examiner may be as to the technical rules of evidence, any layman could not consider himself as fairly deciding a case if he uses campaign literature as evidence. A further astonishing feature of this is the fact that the handbill had been rejected as evidence at the hearing. Indeed, the Respondent offered a series of Union handbills as Respondent's Exhibits 5-A through 5-T. It was stipulated that these handbills were distributed at the Respondent's gates by authorized representatives of the charging Union on the dates indicated on each of them [R. 487]. They were offered to show the entire atmosphere and context surrounding the plant at the time of the election in order to better interpret the employer's

conduct which was in question [R. 488-491]. The offer was rejected by the Trial Examiner. When he came to decide the case the Trial Examiner apparently examined these rejected exhibits and decided to admit the one containing the statement with respect to Respondent's ability to close down the plant. Such was not the purpose for which it had been offered, and the Trial Examiner was thus admitting on his own motion a portion of the evidence previously offered by Respondent and for a purpose other than Respondent had offered it and, in fact, as evidence against Respondent. Apart from the obvious incompetence of the exhibit, for the purpose the Trial Examiner admitted it, the procedure which resulted in his admitting this single handbill is not only contrary to all rules of procedure, but it is not even in accord with common rules of fairness. Again, this is important not only as an instance in which the Trial Examiner made an improper evidentiary and procedural ruling, but by the nature of his error is evidence that he was not impartially deciding the matter.

As further evidence of the Trial Examiner's bias, we point to the method by which he has zigzagged through the record so as to pick up the evidence which he wants and so as to ignore the evidence which he does not want. He in part accomplishes this by using a different measure in weighing the evidence of one witness as compared to another and in judging one incident as compared to another. Thus, the timing of the election was an important measure in the Trial Examiner's mind proving the illegality of LeFlore's discharge. The same measure which would have indicated that Plummer's discharge was legal was not even considered. This is further evidenced by the Trial Examiner's making no reference to the many

instances in which Respondent's testimony was not denied by the General Counsel's witnesses and by consistently pointing out every failure by Respondent to deny the testimony of the General Counsel's witnesses. Further evidence that the Trial Examiner picked his evidence rather than fairly considering all the evidence as a whole is his discrediting of all Respondent's testimony even where it was not contradicted or denied. As in the case of Rasp, this was achieved in some instances by the Trial Examiner pointing to certain contradictions within the witness' testimony which either were not present at all or which are present only upon a nonrealistic interpretation. At the same time, the Trial Examiner points to no inconsistencies in the testimony of the General Counsel's witnesses except in one case where he explained it with an explanation more his own than the witnesses' [R. 49, footnote 8].

A further violation of the procedural requirements for a fair and impartial hearing is the fact that the Trial Examiner found conduct illegal which could not have been fairly considered to be within the contentions made by the General Counsel. Thus, the Trial Examiner finds that the withholding of pay checks on the day of the election was an interference with the election [R. 38]. This was not alleged in the complaint. He also found as unfair labor practices alleged statements by Smith and Watkins that LeFlore would not be rehired since he had been seen passing out Union pamphlets and other statements to the effect that LeFlore had been discharged for Union activity. The complaint alleged neither of those statements. The General Counsel never stated that he contended that they were violative of the Act or that they were within the purview of the complaint. These specific statements were mentioned casually in the testimony of

some of the witnesses and were not pointed to as being the matter which the General Counsel was trying to prove. No attention was given these statements by Respondent since it was not understood that they were involved as independent violations of the Act. The finding in the Intermediate Report that they were violations of the Act was the first knowledge that the uttering of such statements were even involved. One of the most basic requirements to a fair hearing is that the Respondent be fairly informed of just what alleged violations are involved. That has not been done here. It was stated in *N. L. R. B. v. Bradley Washfountain Co.* (C. A. 7, Nov. 1951), 192 F. 2d 144:

> "Of course anyone charged with violation of the law is entitled to know specifically what complaint he must meet and to have a hearing upon the issue presented, and, were what we have said in this respect the only factual or legal question involved, we would necessarily agree with respondent's position. There is a denial of procedural due process of law when the issues are not clearly defined and the employer is not fully advised of them. Consolidated Edison Company of New York v. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126."
>
> *N. L. R. B. v. Bradley Washfountain Co.,* 192 F. 2d 144, 149.

See also:

N. L. R. B. v. Reliable Newspaper Del. (C. A. 3, Feb. 1951), 187 F. 2d 547;

In the Matter of West Fork Cut Glass Company (July 1950), 90 N. L. R. B. 944;

In the Matter of Starrett Brothers and Eken, Incorporated (Jan. 1951), 92 N. L. R. B. 1757.

The Intermediate Report comes clearly within the rule of *Del E. Webb Const. Co. v. N. L. R. B.* (C. A. 8, May 1952), 196 F. 2d 841, where the court pointed out that there was no strong convincing link between the particular fact found and the conclusion drawn from it (p. 846) and emphasized that the evidence cannot be viewed piecemeal, as the Examiner attempts to do in this instance, but must be viewed as a whole, saying:

> "To see if the evidence sustains this finding we must examine the record as a whole, considering not only the evidence tending to support the finding but also the evidence militating against that finding. §10(e) of the Act; 29 U. S. C. A., §160(e). Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456.
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> * * * * * * * *
>
> "The evidence relied on to support the finding consists of suspicions, unfounded conclusions and surmises, and inferences. 'Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established.' National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660."
>
> *Del E. Webb Const. Co. v. N. L. R. B.,* 196 F. 2d 841, 845, 847.

The Examiner's indulgence in inference is condemned in *Interlake Iron Corp. v. N. L. R. B.* (C. A. 7, Oct. 1942), 131 F. 2d 129:

> "But an inference cannot be piled upon an inference, and then another inference upon that, as such inferences are unreasonable and cannot be considered

as substantial evidence. Such a method could be extended indefinitely until there would be no more substance to it than the soup Lincoln talked about that was 'made by boiling the shadow of a pigeon that had starved to death.' "

Interlake Iron Corp. v. N. L. R. B., 131 F. 2d 129, 133.

It is stated in *N. L. R. B. v. International Brotherhood* (C. A. 8, April 1952), 196 F. 2d 1:

" 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Consolidated Edison Co. v. Labor Board, 305 U. S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126. Quoted in Universal Camera Corp. v. Labor Board, 340 U. S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456. It 'must do more than create a suspicion of the existence of a fact to be established.' Labor Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 300, 59 S. Ct. 501, 83 L. Ed. 660."

N. L. R. B. v. International Brotherhood, 196 F. 2d 1, 4.

Other instances of procedural deficiencies in this proceeding are considered elsewhere in this brief.

V.

In Finding That Mr. Osbrink's Talk to the Employees on January 24, 1952 Constituted Interference, the Trial Examiner Failed to Give Sufficient Weight to All of the Comments Made.

The portion of Mr. Osbrink's speech which the Trial Examiner felt violated the Act is quoted in the Intermediate Report, footnote 2 [R. 28]. The Trial Examiner refused to give any weight to the final paragraph of Mr. Osbrink's talk, and which was the portion immediately following the statement which the Trial Examiner thought offended the Act. This statement which the Trial Examiner refused to consider was the statement that the offer he had just made had been made by him many years ago. In the next two sentences he stated twice in different manners that he was not making the statement by way of inducement to employees. We feel that a fair consideration of this speech will not permit this portion of it to be ignored. The meaning which can be read into language, and the intent which can be attributed to any statement is virtually without limit, dependent only upon the imagination of the one interpreting the language. Whether the rights of the employees could be fairly considered as being violated by this speech must be determined from its effect as a whole and not by the possible meaning which could be read into an isolated portion of it. The speech was obviously quite long, and we submit that when read as a whole and with proper weight given the last paragraph, it must be held to be within the area of free speech [see R. 142-158].

In that connection we wish to point out that the Intermediate Report runs afoul of Section 8(c) of the Act. The Trial Examiner finds [R. 45] that in the light of "Respondent's strong bias" against the Union he was convinced that LeFlore was discharged because of his organizational activities. We understand this to mean that the Trial Examiner has used statements, which the Trial Examiner did not find illegal, as establishing the fact that the Respondent disliked entering into a bargaining relationship with the Union. Such statements are privileged, and it is not the Board's right to make conclusions on the basis of an opinion expressed by an individual on such matters and Section 8(c) of the Act was inserted to give express recognition to this limitation. It would seem from other portions of the Intermediate Report that the Trial Examiner used expressions of opinion by Respondent, protected as free speech under the Constitution and by Section 8(c) of the Act, in weighing evidence and coming to conclusions with respect to the existence of unfair labor practices. We submit that this constitutes prejudicial error, requiring that the Intermediate Report be stricken, and that the matter be retried.

> *Pittsburgh S. S. Co. v. N. L. R. B.* (C. A. 6, Feb. 1950), 180 F. 2d 731, affirmed (1951), 340 U. S. 498.
>
> "With reference to the right of free speech the legislative history shows that the amendment embodied in §8(c) of the Taft-Hartley Act was specifically intended to prevent the Board from using

unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct."

Pittsburgh S. S. Co. v. N. L. R. B., 180 F. 2d 731, 735.

N. L. R. B. v. Ray Smith Transport Co. (C. A. 5, Dec. 1951), 193 F. 2d 142.

"Neither are the findings that statements attributed to officers and employees of the company were made in violation of Sec. 8(a)(1) of the act any better grounded in fact or in law. They are not grounded in fact because they are not supported by the credible evidence in the record viewed as a whole. They are not grounded in law because the expression of the views, attributed to and shown by the credible evidence, upon the record as a whole, to have been made by respondent, do not, under the express provisions of the Labor Management Act, 29 U. S. C. A., §158(c) 'constitute or [are they] evidence of an unfair labor practice.' The findings and order of the board are without support in the evidence. An appropriate decree denying enforcement may be presented for entry."

N. L. R. B. v. Ray Smith Transport Co., 193 F. 2d 142, 146-147.

See also:

In the Matter of The Carpenter Steel Company (Mar. 1948), 76 N. L. R. B. 670;

In the Matter of Consumers Cooperative Refinery Association (May 1948), 77 N. L. R. B. 528, 530.

We also submit that the question of whether Mr. Osbrink's speech was violative of the Act can only be properly answered in the light of the entire atmosphere and context in which it was uttered. Respondent's Exhibits 5-A through 5-T, which were offered for that purpose, were rejected, and we submit that the rejection was prejudicial error which destroys the finding that Mr. Osbrink's speech was violative of the Act. There is nothing in the speech which as a matter of law is illegal. The statements can become illegal only by a process of interpretation, which interpretation can be properly made only in the context in which it was made. While it is true that it is the Board's function in the first instance to evaluate this speech and to draw reasonable inferences as to its meaning, the Board may not perform this function without considering all of the evidence which has a bearing.

The California Code of Civil Procedure provides:

> "§*1854. When part of a transaction proved, the whole is admissible.* When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood, may also be given in evidence. [Enacted 1872.]"
>
> Code Civ. Proc., Sec. 1854.

We submit that the finding with respect to Mr. Osbrink's speech must be reversed and the matter must be remanded to the Board for a consideration of Respondent's Exhibits 5-A through 5-T.

VI.

The Charging Labor Organization Was Not in Compliance With the Act When It Filed the Charge or at Any Time Subsequent Thereto.

The charge and the two amended charges were filed by the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (UAW-CIO), Region 6 [R. 3-9]. The Trial Examiner made a conclusion of law and a finding of fact that the organization just named was a labor organization within the meaning of the Act [R. 26, 57]. The term "Union" as used in the Intermediate Report was defined to include the organization just named [R. 23]. The Board adopted these findings and no exceptions were filed to them by any party. The order which the Board issued against Respondent required the Respondent to cease and desist from discouraging membership in or from interfering with the rights of employees to join the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (UAW-CIO), Region 6 [R. 80-81]. The notice which the order required Respondent to post provided that Respondent would not discourage membership in that organization and that employees were free to join that organization.

The designation "Region 6" following the name of the International Union designates Region 6 as the filing party and not the International Union. Thus, if in place of Region 6 we place Local Union No. 100, it would be clear that Local Union No. 100 and not the International Union was the charging party. It is common knowledge that the name of the international organization is a part

of the name of its subsidiary organizations and the name of the international must be included with the name of the subsidiary organization to properly described the latter. Thus, when the Board found this organization to be a labor organization and to have been the organization which filed the charge, it must be understood as meaning that Region 6 was the organization referred to. Such is the plain meaning of words. Region 6, as an organization, has never complied with the filing requirements of Section 9(f), (g) and (h) of the Act so that a complaint may not be issued upon a charge filed by it. The Board did not make an express finding that Region 6 was not in compliance but it is clear from the record that such is the case. Respondent's motion for reconsideration was upon the ground that Region 6 was not in compliance [R. 85] and the supplemental decision of the Board did not deny that fact and, indeed, implicitly agrees that such is the fact [R. 100]. The Board's supplemental decision refused to dismiss the complaint because of the noncompliance of Region 6. Instead, the Board amended its decision and order to delete "Region 6" wherever it occurred "to avoid any further ambiguity" [R. 103] and found as a fact that Region 6 was not a labor organization within the meaning of the Act but merely an administrative subdivision of the International Union. The finding was based by the Board upon a consideration of the constitution of the International Union. The Board's brief states that this constitution had been submitted to the Board as an attachment to a brief filed by this Respondent (Board's Op. Br. p. 36, fn. 18). That statement is incorrect. Respondent did not submit the Union's constitution to the Board, and it is our position that the Board was not entitled to consider it without no-

tice to Respondent. It does not appear upon the record before this court how the constitution was called to the Board's attention. The fact is, however, that it was called to the Board's attention by a memorandum filed by the General Counsel for the charging Union in reply to Respondent's motion to dismiss for failure of compliance. The Board apparently took official notice of the contents of the constitution. The Board's Rules and Regulations provide (Sec. 102.46) that exceptions to the Intermediate Report must be filed within twenty days from the order transferring the case to the Board. Subparagraph (b) provides:

> "No matter not included in a statement of exceptions may thereafter be urged before the Board or in any further proceedings."
>
> N. L. R. B. Rules and Regulations, Sec. 102.46(b).

Section 102.48 of the Board's Rules and Regulations provides in part:

> "In the event no statement of exceptions is filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order shall be adopted by the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes. However, the Board may, in its discretion, order such case closed upon compliance."
>
> N. L. R. B. Rules and Regulations, Sec. 102.48(a).

We submit that these Rules of the Board must be uniformly applied. We do not doubt the Board's authority to rescind its rule or modify it. We do contend that it may not suspend the rule in one case and apply it in another. The supplemental decision of the Board in hold-

ing that the Trial Examiner had not found "Region 6" to be a labor organization [R. 101], and its order deleting the term "Region 6" wherever it occurred in the decision and order, are reopening a finding of fact and conclusion of law which under the Board's Regulations had become final on the failure of any party to take timely exception to it.

In short, the point is that the Board found Region 6 to be a labor organization and to be the charging party, and this finding became final. Region 6 has never been in compliance with the Act so that a complaint may not issue upon a charge filed by it. We also submit that even if the Board could rescind its finding with respect to Region 6 and consider the Union's constitution as evidence, it may not do so in the manner in which it has followed here. The Board's procedure should be strictly held to meet the standards of the rules established to govern it, and if they do not meet those standards it is to defeat the purpose of the rules to permit them to be loosely and nonuniformly applied.

Conclusion.

We respectfully submit that the Board's order is not in accord with the law or the evidence and that the Board's petition for enforcement should be denied and the proceeding dismissed.

Dated: April 7, 1954.

Respectfully submitted,

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